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*September 27, 2018*

Blog Post | 107 KY. L. J. ONLINE | September 27, 2018

**A Brief History of Pre-Obergefell Same-Sex Estate Planning: Adult Partner Adoption**

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The American legal system values marriage and rewards those who enter into the institution. This is especially true in the world of estate planning and taxes. Within that world, marriage grants participants legal benefits like eligibility for estate tax marital deductions, access to survivor's benefits through pension plans, the ability to freely visit spouses in a hospital, and favorable intestate inheritance schemes.<sup>[2]</sup>

For same-sex couples, marriage and the estate planning benefits listed above were not easily accessible until the Supreme Court's 2015 legalization of same-sex marriage in *Obergefell v. Hodges*.<sup>[3]</sup> With the retirement of



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Anthony Kennedy, the Supreme Court's swing vote<sup>[4]</sup>, the holding of *Obergefell* has naturally begun to feel less secure. Although it is unlikely that *Obergefell* will ever be overturned completely by the Supreme Court, a conservative justice will undeniably move the Court to the right.<sup>[5]</sup> This potential nominee could help chip away at LGBTQ+ rights and could, in turn, affect same-sex estate planning. Until 2015, estate planning for same-sex couples often involved legal run-arounds to effectively safeguard each partner's dispositive wishes.<sup>[6]</sup> The little-known history of adult partner adoptions, one such pre-*Obergefell* same-sex estate planning technique, serves as a reminder of all that is at stake in the current political climate.

Beginning in the early 1980s, some same-sex couples opted to have one partner adopt the other as a way to circumvent inheritance taxes and to guarantee hospital visitation rights, among other benefits.<sup>[7]</sup> These relationships differed from standard parent-child adoptions because the two adults were partners; the purpose of the adoption was solely to gain legal benefits, not to change the status or power dynamic of the relationship itself.<sup>[8]</sup> The adoption process in most states was fairly simple, but often forced the adopted partner to legally sever ties with his or her birth family (simultaneously cutting off his or her rights to intestate inheritance from them).<sup>[9]</sup> These adoptions were often kept secret from outsiders and were discussed even less frequently outside of the LGBTQ+ community.<sup>[10]</sup> This secrecy was for good reason. Not only did this new relationship potentially create criminal incest liability, but it also created a new, awkward relationship dynamic that was often difficult to discuss with outsiders.<sup>[11]</sup>

From the lens of 2018, the necessity of taking such extremes to gain legal dispositive protection is not easily comprehended. But it is fact that throughout most of American history, including the early 1980s when the practice of adult partner adoption was born, courts across the country were openly opposed to homosexuality.<sup>[12]</sup> This sentiment did not escape the probate courtroom. For example, in *In re Kaufmann's Will*, Robert Kaufmann, a multimillionaire and heir to the Kay's Jewelry fortune, was in a same-sex relationship with Walter Weiss, who also maintained Kaufmann's finances.<sup>[13]</sup> Prior to his death, Kaufmann updated his will to leave Weiss the majority of his estate.<sup>[14]</sup> Upon his death, however, Kaufmann's family challenged the will.<sup>[15]</sup> The court ruled that Weiss held a dominant position over Kauffmann and, coupled with the court's finding of "suspicious circumstances" surrounding the relationship and updated dispositive wishes, determined that the will was invalid and could not be enforced.<sup>[16]</sup> Scholars often cite to *Kaufmann* as an example of the negative impact that gender norms and homophobia had on LGBTQ+ estate planning during this time.<sup>[17]</sup> It was the prevalence of cases around the country like *Kaufmann* that made it

necessary for members of the LGBTQ+ community to utilize alternative estate planning techniques like adult partner adoption.

Today, in the post-*Obergefell* world, same-sex couples no longer have to use adult partner adoption as an estate planning technique. As a result of the legalization of same-sex marriage, the majority of these adoptions have been annulled or are current in the process of annulment.<sup>[18]</sup> As the struggles of the 20th and early 21st century fade, however, it is necessary for future generations to remember the struggles of the past. For same-sex couples in the 1980s, adult adoption was one solution to the denial of even the most basic of legal rights: deciding one's own disposition. While same-sex marriage has made estate planning more secure than ever before for members of the LGBTQ+ community, the history of the community's fight to plan their own estates and the efforts to get to this moment in time should not be forgotten.

[1] Staff Editor, *Kentucky Law Journal*, Volume 107; J.D. Candidate, University of Kentucky College of Law (2020).

[2] Kate Ashford, *11 Things You Never Thought Of When You Decided Not To Get Married*, FORBES (Sept. 26, 2014, 8:00 AM), <https://www.forbes.com/sites/kateashford/2014/09/26/deciding-not-to-get-married/#69681536edf3>.

[3] 135 S. Ct. 2584 (2015).

[4] Kent Greenfield and Adam Winkler, *Without Kennedy, the Future of Gay Rights is Fragile*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/opinion/kennedy-gay-rights-same-sex-marriage.html>.

[5] *See id.*

[6] *See generally* Gwendolyn L. Snodgrass, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 75 (1997).

[7] Elon Green, *The Lost History of Gay Adult Adoption*, N.Y. TIMES (Oct. 19, 2015, 9:53 PM), <https://www.nytimes.com/2015/10/19/magazine/the-lost-history-of-gay-adult-adoption.html>.

[8] Peter N. Fowler, *Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U. L. REV. 667, 669 (1984).

[9] *Id.* at 678.

[10] Green, *supra* note 7.

[11] See Fowler, *supra* note 8, at 669; Green, *supra* note 7.

[12] See, e.g., *Bowers v. Hardwick*, 394 U.S. 557 (1986).

[13] 247 N.Y.S.2d 664, 666, 670 (1964).

[14] *Id.* at 667.

[15] *Id.* at 665–66, 670–71.

[16] *Id.* at 682–86.

[17] See generally Robert H Stikoff & Jesse Dukeminier, *WILLS, TRUSTS, AND ESTATES* 294–95 (Wolters Kluwer, 10th ed. 2017).

[18] C. Brian Smith, *Before Gay Marriage Was an Option, These Gay Couples Adopted Each Other*, NARRATIVELY (Aug. 17, 2016), <http://narrative.ly/before-marriage-was-an-option-these-gay-couples-adopted-each-other/>.

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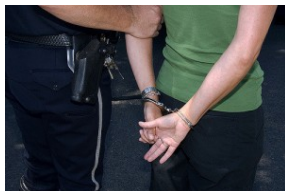
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